

## RECENT QATARI COURTS RULINGS IN RECOURSES FOR SETTING ASIDE ARBITRATION AWARDS

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Since the promulgation of the new Arbitration Law in Civil and Commercial Matters No. (2) of 2017 (The “**Arbitration Law**”), the “Competent Courts” as defined under such law have made positive steps for Qatar in moving towards a more arbitration-friendly jurisdiction and making Qatar a recommended seat for alternative dispute resolution proceedings.

The Arbitration Law has defined the “Competent Court” by (i) the Civil and Commercial Arbitration Disputes Circuit of the Court of Appeals (“the Appeal Court”) or (ii) the Court of First Instance of the Civil and Commercial Court of the Qatar Financial Center (the “QFC Court”) as designated in the agreement of the Parties. Notwithstanding the choice of the Competent Court, Article 33(6) of the Arbitration Law states that “*the Competent Court ruling shall be final and not subject to appeal by any means of appeal*”.

Under the previous provisions that governed arbitration (the now repealed Articles 190-210 of CCPL), the setting aside of an award was subject to three Court instances: The First Instance Court, the Appeal Court and the Cassation Court with the possibility of referrals from one instance to another (as the case may be). Under the Arbitration Law, the setting aside of an arbitration award has become restricted to a single degree of litigation before the chosen Competent Court without the possibility to appeal its decision. Furthermore, the setting aside of arbitration awards is currently restricted to one Division of the State Appeal Court (Division 3). Whilst the QFC Court has as at this date issued one decision on 17 March 2021, the Appeal Court has addressed numerous contentious matters and interpretations in arbitration disputes.

This article explores selected recent rulings made by the Competent Courts under the Arbitration Law, but it does not include the decisions and rulings issued regarding the approval or refusal of applications for the recognition and enforcement of arbitration awards by the Competent Judge

which is defined by the Arbitration Law as Enforcement judge of the Court of First Instance or the Enforcement Judge of the Civil & Commercial Court of the QFC.

## **I – THE CIVIL AND COMMERCIAL ARBITRATION DISPUTES**

### **CIRCUIT OF THE COURT OF APPEAL:**

The following section will address the rulings issued by the Appeal Court – Division 3 (“Appeal Court”) after the promulgation of the Arbitration Law which at this stage are specific provisions that can be taken into consideration as mandatory (or non -mandatory) in arbitral awards with an arbitration seat in Qatar.

#### **1- Should the Arbitration Award be issued in the name of HH the Emir of Qatar:**

Prior to 2017, some Qatari Courts rulings have set aside arbitral awards in arbitration disputes seated in Qatar that were not issued in the name of His Highness the Emir of Qatar on the basis that they violated the public policy. These rulings include the ruling of the Court of Cassation in Challenge ref: 64 of 2012 on 12 June 2012 which stated that *“Article 69 of the Civil Procedure Law indicates that [...] judgments should be rendered and enforced in the name of the highest authority in the country, i.e. His Highness the Emir of Qatar. If this public order rule is violated, the relevant judgment is considered null and void”*.

In Appeal case ref: 2186/2019, the Appellant challenged the arbitration award on the basis that it violated Qatar public policy whereas it was not issued in the name of His Highness the Emir. In the recent ruling issued on 06 July 2020 in this case, the Appeal Court dismissed the setting aside request citing that<sup>1</sup>:

- it is not mandatory as per Article 63 of the Qatar Constitution, Article 14 of the Judicial Authority Law no 10 of 2003, Articles 69 & 126 CCPL and Cassation Court ruling ref: 35 of 2003 to include any particular provisions in the judgments/awards.
- if the content of the judgment does not expressly mention its issuance in the name of His Highness the Emir, this does not “*undermine its legitimacy or affect its validity ... it is clear from the texts of the constitution... that the mere issuance of the award by itself is considered to be issued by the force of the constitution in the name of HH the Emir, and this cannot be altered by not recording it in the Operative part of the Ruling (...) as confirmed in the cassation ruling no. 35 of 2003.*”;
- whereas an arbitral award will be eventually recognized and enforced by a Court order issued in the name of HH the Emir, therefore the issue of the arbitration award without such mention has no adverse effect on the uphold of such award.
- The mere fact that the laws provide that judgments are issued and enforced by Law in the name of HH the Emir infers that they are presumed to be by themselves issued by the power of the Constitution and this cannot be altered by the mere omission of such mention from the dispositive part of the award, whereas it is considered as a subsequent material act that “declares” such inference and is not a complementary act thereto, and such omission would not lead to the annulment of the award.

## 2- Is it mandatory for the Parties to be represented by a legal representative that do meet the legal capacity of an advocate in accordance with the Qatari Advocacy Law?

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<sup>1</sup> "والنص على ان الاحكام تصدر وتنفذ باسم صاحب السمو أمير البلاد يفصح عن ان هذا الصدور في ذاته أمر مفترض بقوة الدستور نفسه ولا يغير من ذلك إغفال اثباته بديباجية الحكم لأن ذلك يعتبر عملاً مادياً لاحقاً كاشفاً عن ذلك الأمر المفترض وليس متممة له حسبما يستفاد من نص المادة 126 من قانون المرافعات، فإن غفل عن إثباته لا يؤدي للبطلان".

In Appeal case no. 2211/2019, the Appellant in the setting aside recourse of an ICC arbitration award pleaded that the arbitration procedures violated Articles 18, 19 and 33 of the Arbitration Law and Article 3 of Code of Law Practice no. 23 of 2006 and the Arbitral Tribunal's own procedural order regarding the legal representation of the parties.

In its recent ruling issued on 06 July 2020 in this case, the Appeal Court dismissed the setting aside request citing:

- That *“an irregularity in the legal representation of the parties does not constitute grounds to set aside the arbitration award whereas it is not cited among the cases mentioned in Article 33 cited on exhaustive basis, and what is intended by para 2(a) of this Article is the arbitration agreement itself and not the Terms of reference or the deed of arbitration”*.
- The arbitration rules applied in the arbitration proceedings provide that the signature of the terms of reference is carried out by the concerned persons or those who have a power of attorney to do so, moreover the Appellee has provided proof of authority for its representation;
- The Appellant cannot contend a right granted by the law to the counterparty as per Article 159 of the Civil Code<sup>2</sup>;
- The ICC Rules do not require the parties to be represented by a legal representative that meets the legal capacity of an advocate in accordance with the Qatari Advocacy Law.

### **3- Interest as compensation for damages:**

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<sup>2</sup> Article 159 of the Civil Code<sup>2</sup> provides “Where the law recognizes the right of one of the contracting parties to revoke the contract, the other party cannot avail himself of this right. Where the right of revocation is available and the holder thereof requests its enforcement, the court shall so enforce it, unless the law provides otherwise.”

The previous court rulings regarding the award of interest as damages was mainly limited to the cases where an agreement between the parties on applying interest existed, otherwise the court would grant in certain cases a lump sum as compensation for the successful party determined at the discretion of the judge. Based on the Courts rulings cited hereinafter, it appears that the award of interest whether as a compensation for delay in payment or as damages for breach of contract is considered as constitutional, legal and does not contravene the general principles and rules of the Islamic Sharia'a.

In recent judgments such as the Cassation Ruling ref: 24/2018 dated 27/02/2018, the Appeal Judgment ref: 36 of 2019 dated 30 September 2019, the Appeal judgment ref: 31/2019 dated 20 October 2019 and the Appeal judgment ref: (not available) dated 25/01/2021, the courts have dismissed challenges of arbitration awards whereby the Arbitral Tribunal have awarded interests contractually accrued on commercial debts or as compensation for damages for delay in payment by the Debtor of the awarded amounts, on the basis that (i) the interest awarded is part of the banking system and (ii) regulated by Qatar Central Bank and therefore such awards do not violate the law or the public order.

The arguments raised by the Appellants in the various challenges against different arbitral awards were similar, contending mainly that the award of interest was incompatible with Sharia'a Law Principles and Qatar public policy, thus, the award is unenforceable under Article 33(3) of the Qatar Arbitration Law.

Such arguments were rejected by the Appeal Courts. As stated in the ruling ref:31 of 2019 "*Sentencing the Appellant/debtor to pay the interest is merely a compensation for the delay in performing its obligations, and whereas the Qatar Central Bank Law has authorized the banks to charge interest over outstanding debts owed by the debtor, this leads to conclude that the Qatari legislator did not consider the accrual of interest for delay in payment of debts as contrary to the constitution or the Islamic Sharia'a and consequently as contrary to the public order, and therefore the argument is factually and legally baseless whereas not included in the grounds for annulment cited in Article 33 of the Arbitration Law.*". This argument was previously raised by the Court of Appeal in case 24/2018 and subsequently upheld by the Court of Cassation.

Similarly, in Appeal Case no. 36 of 2019 to partially set aside a QICCA arbitral award whereby the arbitral tribunal granted the Respondent interests in an Islamic Sharia'a financing contracts with a bank, the bank - the unsuccessful party - raised similar arguments before the Court of Appeal and argued additionally that the Tribunal did not implement the law chosen by the parties which was the principles of Sharia's Law, and implemented instead the Civil Code provisions and the *ex aequo et bono* principles. The Appeal Court decided to dismiss these arguments on the same basis as Appeal case ref:31 of 2019 hereabove and stated additionally that the Terms of Reference provide that "*whereas the parties have agreed in their contracts to submit such contracts to the Islamic financing regime in accordance with the Islamic Sharia'a rules and principles which leads to implement them on the substance of the case in a manner consistent with the governing laws in the State of Qatar*", thus the implementation of the civil law on the dispute and the amounts awarded in accordance with the expert report and the calculation of the interest on such amounts is in conformity with the terms of reference executed between both parties.

#### **4- Nomination of arbitrators by the Appeal Court in an institutional arbitration:**

The Appeal Court in judgment no. 15/2019 and judgment no. 54/2019 both dated 18/11/2019 agreed to appoint arbitrators notwithstanding (i) that in both cases the dispute was subject to an institutional arbitration as per the provisions of the arbitration agreement of the parties and (ii) the provisions of Articles 11(7) – 13(1) – 14 of the Arbitration Law. The Court appointed an arbitrator as requested by the Appellant, citing that (i) there is a request made by the Appellant for the appointment of an Arbitrator upon failure by the Parties to mutually agree on his/her nomination, and (ii) the Appellee/Respondent was represented in the Appeal Court proceedings and did not raise an objection to challenge this request.

It appears from these judgments that the main basis for such rulings was the fact that there was no objection raised by the Appellee (Respondent). It is unknown as to what the Appeal Court position would have been if such objection were to be raised by the Appellee or if the institution under which auspices the arbitration is conducted would have exercised its authority on the subject matter.

#### **5- Appointment of arbitrator by the Qatari Court in a Dubai seated arbitration during the blockade:**

Another interesting court ruling is the Appeal Court judgment (ref: not available) dated 14/12/2020 in a case where the Applicant requested the Qatari Appeal Court to appoint an arbitrator in arbitration proceedings with a seat in Dubai, arguing that it was “*impossible*” to appoint an arbitrator in Dubai due to the blockade imposed by some GCC countries against Qatar at that time.

The judgment ruled that whereas the Arbitration clause provides for a dispute resolution mechanism (the two parties have agreed on the settlement of any dispute that arises between them through amicable settlement after notifying the counterparty, and upon failure, to conduct mediation and lastly to resort to arbitration) and whereas the Applicant did not prove that notice for arbitration was served upon the Appellee in arbitration proceedings with a seat in Qatar, the Appeal Court decided to dismiss the case.

The position of the Appeal Court upheld the premature initiation of the arbitration proceedings whereas the different stages of the dispute resolution clause were not followed by the Applicant.

#### **6- Challenging the arbitrator during arbitration proceedings:**

In a case filed on 8 October 2019 against an arbitrator and the counterparty whereby the Appellant challenged the arbitrator appointed by the Appeal Court and requested the referral of the request to QICCA to nominate a new arbitrator that is an English speaker and apply the QICCA Rules, and in the alternative to challenge the appointed arbitrator and appoint another arbitrator at the court’s discretion on the condition that he/she is in good command of English. After the Appeal Court has previously dismissed the challenge filed against this arbitrator, the Appellant filed a new challenge on the basis of the suspicion on his independence and impartiality, and the lack of qualifications agreed upon by the parties and requested that the Arbitrator confirms under oath that he is sufficiently fluent in English to arbitrate. Subsequently the arbitrator resigned for personal reasons and the Appellant requested the Appeal Court to refer the matter to QICCA to appoint a new arbitrator that is an English speaker and expert in Engineering and in the alternative appoint one of the two names provided by the Applicant.

The Appeal judgment (ref: not available) issued on 6<sup>th</sup> July 2020 ruled for the dismissal of the first challenge due to the authority of the previous ruling - *Res Judicata*. As for the subsidiary request to replace the Arbitrator that has resigned by referring the matter to QICCA or in the alternative appoint one of the two names proposed by the Appellant; the Appeal Court decided that the referral to QICCA or to any other party to decide on the matter in case both parties agree to it is valid and therefore the Court agreed and decided to appoint one of the nominated arbitrators taking into consideration the non-objection of the Appellee on any of the proposed names.

As can be seen from this case and the precedent cases regarding appointment of arbitrators in institutional arbitrations, it appears that the Parties derogated from the institutional rules chosen in the arbitration agreement (Art. 19 of the Arbitration Law and QICCA Rules in this instance – Articles 13 to 15 which provide for a challenge procedure before such institution without referring the matter to the judicial court<sup>3</sup>). It is also pertinent to highlight that the Appeal Court has mainly relied in its rulings on the mutual consent of the parties or their no-objection on such request that derogates from the institutional rules.

#### **7. Inadmissibility of the case of setting aside an arbitration award due to missing State Court requirements:**

In two Appeal judgments ref: 26 of 2019 dated 30/09/2019 and (ref: not available) dated 16/12/2019, the Appeal Court has considered that the cases for setting aside the QICCA awards issued in a foreign language were inadmissible given that no translation in Arabic was submitted to the Court in both and in one of them the Appellant did not submit any Statement detailing its contended grounds for annulment.

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<sup>3</sup> Under QICCA Rules, decisions regarding arbitrators are made by QICCA Committee of Conciliation and Arbitration: Art. 10/ Appointment of Arbitrator - Art. 13/ Removal of Arbitrator - Art. 14/ Challenge of Arbitrator - Art. 15/ Replacement of Arbitrator.



Whilst Article 34(2) has identified the documents to be provided to the Competent judge for the recognition and enforcement of an arbitration award, Article 33(5) does not provide for any specific requirements. In this context, the QICDRC provides a bilingual service (Arabic – English) to the litigators and does not mandatorily require any translation to be submitted by the parties (noting that such Court has an internal translation service from and to Arabic), while before the State Courts in all litigation cases all documents have to be submitted in Arabic which is the official language of the Courts and the State and in accordance with Article 1 of the Qatari constitution, Article 69 CCPL and Article 16 of the Judicial Authority Law no. 10 of 2003 that consider the Arabic language as the official language of the State of Qatar.

#### **8. Jurisdictional Objection – Arbitration Agreement not enclosed with arbitration award**

The Appeal Court has decided in its judgment ref: 33/2020 dated 06/07/2020 and judgment ref: 26/2019 dated 30/09/2019 to dismiss all the contended reasons for setting aside an ICC arbitration award on the basis that (i) the Arbitral Tribunal shall decide on its own jurisdiction, on the invalidity of the arbitration agreement or on a premature arbitration (Art 16/1-2 of Arbitration Law) and whereas the Appellant have not raised these objections before the Arbitral Tribunal, its allegations must be dismissed; (ii) the contention that the arbitral award did not enclose a copy of the Arbitration Agreement is also dismissed whereas the arbitral award includes all mentions cited in Article 31 of Arbitration Law.

Whilst Article 31(2) of the Arbitration Law states that the arbitration award shall include *inter alia* “a copy of the Arbitration Agreement” and Article 7 of such law gives a definition of the “Arbitration Agreement”, the Appeal Court appears to confirm that quoting the wording of such Agreement in the dispositive part of the award without enclosing a physical copy thereof meets the requirement of the arbitration law. It also appears that in this case, the Appeal Court did not find it necessary to return the award to the Arbitral Tribunal to correct this alleged irregularity, whereas it does not seem to consider it as such.

#### **9. Setting aside an arbitration award for violating the right of defense**

In a recent ruling issued on 11 April 2021 in case ref:553/2020, the Appeal Court decided to set aside an arbitration award due to the violation of Article 33(2)(b) and based on the position of the Courts and the French Cassation Court various rulings, whereas the Respondent (i.e. the Applicant for annulling the award) was not duly notified of the appointment of the arbitrator or of the arbitration proceedings. The Court considered that this affected the most important right in dispute resolution which is the right of defense and the principle of due process (adversarial principle) that are recognized by all constitutions and laws and established in the arbitration rules and jurisprudence. In this particular case, the Respondent was notified at a PO Box that was not provided for in any contractual document and registered under the name of a third party to which no power of attorney was issued to accept notification on behalf of the Respondent.

## **B- Cassation Court**

In Cassation rulings n. 420/2018 dated 25/12/2018 and no. 126/2019 dated 16 April 2019 and no. 427/2020 dated 04/11/2020, the Cassation Court has confirmed that as a matter of Public Policy the Appeal Court ruling in a case of setting aside an arbitration award is not subject to appeal by any means of Appeal<sup>4</sup>.

## **II- QICDRC – CIVIL AND COMMERCIAL COURT – FIRST INSTANCE CIRCUIT:**

### **1. First ruling in an Arbitration Related Matter**

For the first time a ruling was issued by the QFC Civil and Commercial Court in Case No: CTFIC0004/2021 dated 17 March 2021 under the Arbitration Law, whereby the QFC Court accepted its jurisdiction but declined the relief sought by the Applicant. In this case the QFC Court has heard an urgent application for an interim relief relating to a proposed arbitration based on an arbitration agreement that states “*The seat of the arbitration be the Qatar International Court and Dispute Resolution Centre (QICDRC) in the Qatar*

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<sup>4</sup> The Cassation Court rulings come in accordance with the express provisions of Articles 33(6) - 11(7) – 13(1) and 14 of the Arbitration Law

*Financial Centre, Qatar and the venue of the arbitration shall be Qatar”, where neither of the companies were registered in QFC and at a time when the Applicant had stated that it was still in the process for filing for an arbitration request in relation to the dispute.*

## **2. Designation of QFC Court and QFC Judge as Competent Court and Judge:**

The Arbitration Law no. 2 of 2017 has granted the parties - regardless of whether they were registered or not in the QFC- the right to agree on the Civil and Commercial Court of QFC as the Competent Court and on the enforcement judge of the Civil and Commercial Court of QFC as the Competent Judge for the purposes of the Arbitration Law. This means that the Parties can insert in their arbitration agreement or in any other form of agreement their mutual designation of such Court or Judge for the purposes of the Arbitration Law.

Whereas lately there have been agreements among the parties to designate the QFC Court and QFC Judge as the Competent Court and Judge, the Court and the Judge are likely to rule in the near future on cases pertaining to arbitration. We are yet to know if the State Courts and the QFC Courts will have unified and consistent rulings in matters pertaining to arbitration and alternative dispute resolution.

**This Article has been prepared by Ms. Claudia el Hage for Qatar Chamber “Qatar International Center for Conciliation and Arbitration”**

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